STATE OF MICHIGAN

COURT OF APPEALS

EDWARD L. PARKER and TANNITH PARKER, Plaintiffs-Appellees, v CITY OF FLINT, Defendant-Appellant.	UNPUBLISHED July 17, 2008 No. 275520 Genesee Circuit Court LC No. 05-081281-CD

Before: Meter, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant, city of Flint, appeals as of right the judgment entered in favor of plaintiff, Edward L. Parker, in the amount of $219,179.80 as damages for breach of employment contract in this wrongful termination case.[1] We vacate the award of damages and remand to the trial court for entry of an order of dismissal.

I. Factual and Procedural History

Defendant hired plaintiff for the position of Deputy City Attorney in 1996. Plaintiff and defendant entered into a series of employment contracts for specified terms beginning with the first contract spanning October 2, 1996, to October 31, 1998.[2] Each successive contract began before the termination of the preceding contract.

While plaintiff was on a medical leave of absence, the city attorney, Karen Lopez, resigned her position. Before her resignation, Lopez was asked by Melanie Purcell, defendant's director of budget management, for recommendations regarding methods to reduce the law department's budget. Defendant asserted it was seeking recommendations for methods to reduce

[1] The jury award of $378,289 for future health insurance costs was reduced to a present value of $219,179.80.

[2] The duration of each successive employment contract was as follows: (a) July 1, 1997, through June 30, 1999; (b) July 1,1998, through June 30, 2001; (c) July 26, 1999, through June 30, 2002; (d) July 1, 2000, through December 31, 2003; (e) July 1, 2001, through June 30, 2005; (f) March 1, 2002, through June 30, 2005.

the budgets for all departments due to the existence of a multi-million dollar deficit. While plaintiff remained on medical leave, and following the resignation of Lopez, the acting mayor named Karen Folks, the attorney next in seniority following plaintiff, as interim chief legal officer. Folks recommended to Purcell and the acting mayor staffing reductions of the law department, including the elimination of the two attorney positions held by herself and plaintiff. Purcell and the mayor then presented a reorganization plan to the city council, which included the elimination of these two positions and additional recommendations for budgetary reductions in other departments. The city council adopted the proposed reorganization plan, effectively eliminating plaintiff's position with defendant's legal department. On April 30, 2002, when plaintiff returned from medical leave, Folks provided him with written notification of his termination based on the elimination of his position.

Plaintiff and his wife, Tannith Parker, filed a complaint alleging wrongful termination based on age, race, sex and disability discrimination, breach of contract and wrongful discharge.[3] Following discovery, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) alleging that plaintiff's employment contracts were not enforceable and raised the defense of economic necessity for plaintiff's termination based on its financial crisis and an impending takeover of defendant by the State. Plaintiffs responded by contending that a bona fide economic reason was not the basis for the discharge and that the contract did not contain a specific "just cause" provision and was, therefore, only terminable based on one of the specific conditions contained in the contract. The trial court granted, in part, and denied, in part, defendant's motion for summary disposition and ruled that plaintiff's breach of contract claim could proceed to trial.

Before trial, plaintiff brought a motion in limine pertaining to the issue of medical insurance replacement costs as a measure of damages. Plaintiff asserted that his entitlement to medical insurance pursuant to his employment contract permitted a determination of damages for loss of this benefit despite, as argued by defendant, the availability to plaintiff's wife of medical coverage for future health care costs. Defendant asserted any such damages were purely speculative based on the availability of such insurance through the employer of plaintiff's wife and the uncertainty regarding what alterations may occur in the future regarding the level and type of health care benefits offered by defendant to employees. The trial court denied plaintiff's motion to preclude defendant's presentation of evidence pertaining to alternative sources of medical insurance available to plaintiff.

The jury returned a verdict in favor of defendant on all plaintiff's discrimination claims, and only awarded as damages to plaintiff the cost of future health insurance in the amount of $378,289, which was subsequently reduced to present value. Defendant filed a motion for judgment notwithstanding the verdict (JNOV), which the trial court denied based on defendant's failure to present any arguments different from those provided at the motion in limine.

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[3] Tannith Parker's claim was derivative based on loss of consortium.

II. Standards of Review

Defendant brought motions for a directed verdict and JNOV, which the trial court denied. This Court reviews de novo a trial court's denial of a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). This Court reviews "the evidence and all legitimate inferences in a light most favorable to the nonmoving party." *Id.* Only if the evidence fails to establish a claim as a matter of law should a motion for a directed verdict or JNOV be granted. *Id.* "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Diamond v Witherspoon*, 265 Mich App 673, 682; 696 NW2d 770 (2005). We also review the denial of a motion for directed verdict de novo. *Foreman v Foreman*, 266 Mich App 132, 135; 701 NW2d 167 (2005). In addition:

> In reviewing damage awards in cases tried to juries, this Court has asked whether the award shocks the judicial conscience, appears unsupported by the proofs, or seems to be the product of improper methods, passion, caprice, or prejudice; if the amount awarded falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation for the injury sustained, the verdict has not been disturbed. [*Precopio v Detroit*, 415 Mich 457, 465; 330 NW2d 802 (1982) (footnote omitted).]

III. Analysis

Although defendant raises two issues on appeal, we initially address the challenge to the award of lifetime medical coverage to plaintiff because it is dispositive. Defendant argues that plaintiff's contract for employment did not include a provision guaranteeing lifetime medical benefits, for him and his spouse, upon the attainment of eight years of service. Plaintiff acknowledged that he relied not on his contract for the provision of this benefit but, rather, on past practices by defendant as espoused in a memorandum issued by Lopez, in her role as City Attorney, on June 1, 2001 (hereinafter "the Lopez memorandum").[4] Defendant argues that such reliance is unfounded given plaintiff's inherent knowledge as an attorney and his familiarity with the City Code, which provides for the vesting of this benefit after the completion of ten years of service. Defendant further asserts the award should be vacated because it is too speculative.

Plaintiff's employment contract provided, in relevant part:

> 3.b. Provide the Attorney with fringe benefits equal to those now or hereafter provided for an exempt employee allocated to Level 23 and above, including, but not limited to health care coverage, dental insurance, life insurance, annual,

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[4] Plaintiff also referenced a memorandum issued by Robert C. Erlenbeck, defendant's Insurance, Risk & Benefits Manager, pertaining to retiree health care coverage along with earlier memoranda by other individuals, which specifically addressed health care coverage solely for police and fire personnel and their spouses. To the extent plaintiff relied on these documents such reliance is misplaced given their very specific application only to retirees and police or fire personnel.

> personal and sick leave days, etc.; but expressly excluding membership in the retirement system and expressly excluding membership in the Civil Service System.

Notably, all plaintiff's prior contracts with defendant also included language indicating, "This document embodies the total terms and conditions of employment between the parties hereto."

The Lopez memorandum was directed only to plaintiff and addressed the vesting and eligibility for lifetime medical benefits. Lopez cited the language contained in ¶ 3.b. of plaintiff's contract as standard language "that numerous attorneys employed in this department have relied on . . . in accepting and maintaining continued employment with this department." Lopez identified two attorneys indicating one had returned to employment with defendant from private practice "in order to vest this benefit." The other individual identified purportedly obtained eight years of service and, thereby, "was eligible to continue receiving those benefits upon her departure." Lopez concluded by opining "that persons who hold Attorney positions in the Law Department are eligible for continued health care benefits upon attaining eight (8) years of service with the City," and that "[t]his benefit likewise extends to the spouses of these named individuals."

We find it disingenuous that plaintiff, as an attorney employed by defendant and responsible for knowledge and interpretation of the City Code and other laws, would rely on a memorandum rather than the actual terms of his contract regarding entitlement to these benefits. This is particularly true given the conflict between the memorandum and the restrictions imposed by the City Code regarding the number of years of employment required for such eligibility. Interpretation of plaintiff's contract in conjunction with the provisions of the City Code regarding ten years of service for vesting of this benefit would preclude any such award.

Further, plaintiff's alleged reliance on the memorandum is particularly suspect given his acknowledgement, at trial, that he was the actual author of the document and not Lopez. The subject memorandum was not issued until 2001, approximately five years after plaintiff's initial contract with defendant. However, the wording of the benefits provision of plaintiff's contract did not vary in any substantive manner subsequent to issuance of this memorandum. Consequently, plaintiff fails to allege sufficient evidence to support the conclusion by the jury that he legitimately relied on and was entitled to the receipt of lifetime medical coverage.

In accordance with general principles of contract law:

> If no reasonable person could dispute the meaning of ordinary and plain contract language, the Court must accept and enforce the language as written, unless the contract is contrary to law or public policy. Plain and unambiguous contract language cannot be rewritten by the Court 'under the guise of interpretation,' as the parties must live by the words of their agreement. The meaning of clear and unambiguous contract language is a question of law." [*Harbor Park Market, Inc v Grondan*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007) (citations omitted).]

Consequently, it is the language of the contract that governs plaintiff's entitlement to benefits and not an ancillary document. As recognized by all but one of plaintiff's contracts with

defendant, the contract "embodies the total terms and conditions of employment" and cannot be expanded, modified or enlarged simply by issuance of the subject memorandum. The Lopez memorandum cannot legitimately be viewed as a modification to plaintiff's contract because it did not develop based on procedures designated for modification within the contract, which require a writing and the signatures of both parties.

Defendant also contends that the trial court erred in failing to grant JNOV based on the speculative nature of the awarded damages. Defendant argues that plaintiff never availed himself of the use of these benefits because he was covered under health care provided by his wife's employer and that any suggestion or implication that her benefits might cease in the future was entirely speculative.

"Damage awards cannot . . . be based upon mere speculation and conjecture." *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 542; 470 NW2d 678 (1991). Although defendant presented expert testimony regarding the projected value of the medical coverage, the award itself was speculative and based on conjecture. Notably, even if plaintiff's position had not been eliminated, there was no guarantee that his employment would have continued until expiration of his contract or that vesting of the benefit would occur, based on the right of either party to terminate the agreement following notice. Further, the contract limited the provision of fringe benefits "equal to those now or hereafter provided." Based on the purported financial crisis facing defendant, there existed no guarantee that the type or level of benefits available at the time of plaintiff's contract would be maintained or would not be altered. Thus, any calculation of future benefits is unduly speculative and based on conjecture that the alleged "status quo" would be maintained indefinitely. Consequently, we vacate the award of damages. Because damages are an element of a breach of contract action, *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); *Shippey v Madison Dist Pub Schools*, 55 Mich App 663, 668; 223 NW2d 116 (1974), plaintiff's breach of contract claim cannot be sustained.

Finally, although we need not address defendant's assertion of error pertaining to the trial court's refusal to permit the defense of economic necessity to plaintiff's breach of contract action for resolution of this appeal, we find that the trial court did err in this regard.

In the lower court, plaintiff argued that he was wrongfully discharged because, based on his written employment contract with defendant, he could only be discharged for specific violations of the contract or on receiving 30 days notice before expiration of the contract term. Defendant contends that the trial court erred in precluding the defense of economic necessity, asserting it always constitutes a valid basis for employment termination. In support of defendant's position, we note that "an employee who is discharged for reasons of budget cutbacks or economic necessity does not have grounds for a wrongful discharge claim, even if the employment contract expressly provides that the employee is subject to termination only for just cause." *Reisman, supra* at 531, citing *Bhogaonker v Metropolitan Hosp*, 164 Mich App 563; 417 NW2d 501 (1987).

Defendant's position is consistent with our Supreme Court's ruling in *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980) and its progeny, which provide "that an employee may have an enforceable right not to be terminated except for just cause, grounded in either an express oral or written contract or in legitimate expectations arising from an employer's policy statements." *McCart v J Walter Thompson USA, Inc*, 437 Mich 109,

114; 469 NW2d 284 (1991), citing *Toussaint, supra* at 498-599. However, it is recognized that, under *Toussaint*, "bona fide economic reasons for discharge constitute 'just cause.'" *McCart, supra* at 114; see also *Friske v Jasinski Builders, Inc*, 156 Mich App 468, 472; 402 NW2d 42 (1986).

Plaintiff is correct in asserting that the written contract executed between the parties is subject to enforcement consistent with its terms and defendant's agreement to restrict its discretion to terminate his employment. However, while relying on this premise as set forth in this Court's ruling in *Thomas v John Deere Corp*, 205 Mich App 91, 93; 517 NW2d 265 (1994), plaintiff fails to recognize the limitations of that decision. In *Thomas*, while this Court acknowledged the rules pertaining to employment contracts and their interpretation, a limitation was noted. Specifically:

> If an employment contract provides that the employer can terminate the employment only for just cause, then that provision is enforceable and the employer cannot terminate employment at will. [*Thomas, supra* at 93.]

Contrary to plaintiff's interpretation, termination of a just cause employment contract does not preclude the defense of economic necessity, rather it merely assures that any termination is consistent with the just cause nature of the contract and prohibits the employer from discharging an employee "at will."

We vacate the jury award in favor of plaintiff and remand to the trial court for entry of an order of dismissal. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Deborah A. Servitto